Supreme Court, U.S.
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No. 87-988

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE H. KASPER, JR

Petitioner,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Respondent.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION

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REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner, George H. Kasper, Jr., files this Reply Brief to Brief of Respondent In Opposition to the grant of the Writ of Certiorari, and urges the grant of the Writ of Certorari.

FNMA Counterstatement of questions presented:

> "1. Whether claims never raised by the Petitioner in the Courts below, such as those relating to an alleged breach of contract, a supposed violation of due process, and related matters, can properly be included in a petition for a writ of certiorari."

is without merit.

The memoranda of employment from Sec. HUD Weaver and FNMA Pres. Lapin, and Petitioners written acceptance thereof, were attached to Petitioners affidavit of September 20, 1984 as ATTACHMENT A, as outlined in Petition for Writ of Certiorari

in Statement of Facts at p. 13.

In Reply Brief filed by FNMA in District Court in October 1984, at p. 13, FNMA acknowledges: "the Intervenor nevertheless contends that he has some sort of employment contract..." Yet, while ignoring Petitioners affidavit, contends that: "The general statements made at the time that FNMA was being reorganized and the general policies unilaterally adopted by FNMA at that time do not constitute a binding employment contract under Georgia law, and the Intervenor has no viable cause of action for breach of contract... Under Georgia law, an employment relationship for an indefinite term such as that between FNMA and the Intervenor is terminable at will... Either party to such a relationship may terminate it at any time without liability,"

FNMA also ignores Petitioners Government civil service employment status, FNMA's

"Federal Action" and the federal laws applicable to Petitioners employment relationship, both as incorporated in the contract and as by law. FNMA contends that it can terminate Petitioners employment by involuntary retirement "at will", "without cause' or "due process", "at any time without liability".

Jackson Transit Auth. v. Local Division 1285, 457 U.S. 20 at p. 22, 102 S.Ct. 2222 (1982):

> "[1] These decisions demonstrate that suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes."

Machinists v. Central Airlines, Inc., 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed. 2d 67 (1963), Norfolk & Western R. Co. v. Nemitz, 404 U.S. 37, 92 S.Ct. 185, 30 L. Ed. 2d 198 (1971), and Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 at 18-19, 100 S.Ct., 242 at 246-47.

As to the "due process" claim -

In "Brief of Intervenor in Opposition to Defendant's Motion for Summary Judgment and for Judgment on the Pleadings" filed in District Court on October 1, 1984, Petitioner states, at p. 16: "First, Intervenor has not charged formal violation of the Fifth and Fourteenth Amendments. Although argument would well be made that such formal 'due process' requirements survived and inured to Intervenor's benefit by the very nature of the transition from Government to private FNMA, the representations made that new FNMA employees would have employment benefits equal to, if not better than, existing ones (which included formal 'due process'), and because of governmental involvement in doing federal work on contract. However, Intervenor does not need to charge such formal 'due process' denial.

Intervenor does allege the right to and

deprival of that 'due process' which was assured pursuant to the provisions of the transition and offer of employment with the new FNMA, those rights which have been provided and assured by FNMA in its procedures and policies, and those 'due process' requirements inherent in good faith and fair dealing that a person be informed of charges against him, given an opportunity to respond and not be dealt with summarily.

While employed by FNMA when it was within the Department of Housing and Urban Development, and with GNMA, Intervenor had those formal 'due process' rights guaranteed to an individual by the Constitution of the United States. Intervenor had 'due process' rights pursuant to those employment provisions offered Intervenor pursuant to the transition, commented on hereinbefore. Intervenor had a right to 'due process' from FNMA. At this juncture the Seminar Workbook 'Improving Employee

Selections, Evaluation & Termination Practices' [ATTACHMENT Q - Kasper Affidavit] becomes significant. None of the procedures set forth on page 41 were followed with respect to Intervenor."

To which, in Reply Brief filed by FNMA in District Court in October, 1984, at p. 17, FNMA states: "V. THE INTERVENOR'S DUE PROCESS CLAIMS SHOULD BE DISMISSED. The Intervenor has conceded that he has no formal right to due process under the Fifth and Fourteenth Amendments... He apparently now asserts that he has a right to some sort of due process under state law."

The due process, and breach of contract issues were presented and argued before the District Court in October, 1984.

FNMA represents to this Court that:

"At no time in the Courts below did Kasper present the due process, breach of contract and related issues he seeks to raise, and, for that reason alone,

the petition should be denied with respect to those matters."

This representation is obviously not true.

We will not burden the record here by repeating the conflicts existing among the various courts as to the issues raised, and their application to the facts of this case, beyond what has been presented in the Petition for Writ, and as herein shown.

FNMA further charges that "no important questions of law are involved in Kasper's claims." Petitioner contends that these questions, again, are obvious. The misapplication of Ricks, Fernandez, Cort and Transamerica are shown in the Petition.

FNMA contends that "no one other than the litigants in this action" would be affected. All FNMA employees, especially those with "government status" will be affected by FNMA contention that it can terminate employment "at will", "without cause" or "due process", "at any time

without liability". FNMA civil service employees are affected when FNMA asserts unlawful authority to unilaterally amend the civil service early retirement plan so as to allow FNMA to involuntarily force them to retire against their will and accept reduced civil service annuity payments contra to the law requiring that the retirement be strictly optional with employees. Mason v. Lister, 562 F.2d 343 (5 Cir 1977) previously cited, also Patterson v. Independent School Dist. #709, 742 F.2d 465 (1984) and Sexton v. Beatrice Foods Co. 630 F.2d 478 (1980) at p. 482 and 483:

> "the § 4(f)(2) exception is applicable only where the scope of involuntary termination is expressly provided for in an employee's retirement plan." and
>
> "It is also important that a retirement plan gives the employee notice of the age at which the employer may force him to retire, since the lack of such notice deprives the employee of an adequate understanding of his financial and other expectations under the plan. Congress would not have exempted from ADEA liability an age-based retirement pursuant to a plan if the plan did not give the employee sufficient information to

enable him to plan for his retirement or to negotiate with his employer for some other mutually acceptable arrangement."

As to tolling of the 180-day filing limitations period - Petitioner has identified the FNMA misrepresentations, misconduct and Policy and Procedures which estop FNMA from relying on the limitations period. First, it should be emphasized that Petitioner contends that his filing, within 12 days of involuntary retirement, was timely. However, in any event, FNMA is estopped from claiming the limitation.

The evidence shows that FNMA has intentionally created and skillfully orchestrated a situation, at its own option, to its advantage, with the ultimate goal of unlawfully retiring Petitioner and avoiding a successful ADEA action. The precise timing of events from July 22, 1982, until August 5, 1983 could not have been accidental. The events were intentionally tailored, at FNMA's option, to take

advantage of FNMA's perception of the application of the "one year notice" as discussed in Ricks.

FNMA tried to coerce Petitioner into voluntary retirement on August 5, 1983 by creating civil service retirement eligibility, tightening the "economic noose" and reducing his salary on a quarterly basis while at the same time negotiating with him on other benefits as late as July 26, 1983. FNMA misrepresented his employment status, transferred Petitioner on October 4, 1982 without advising him, and created a confusing, ambigious employment status, while retaining him as Assistant Regional Vice President- Counsel until August 5, 1983, in order to delay Petitioners filing of his EEOC charge, until after FNMA exercised its options and revealed its true intentions. FNMA then claimed that Petitioner had filed his EEOC charges too late.

The Petition for Writ of Certiorari is long, however, within limits. A half is dedicated to "Petitioner's Complaint" and "Statement of Facts" and is as concisely presented as these will allow for the Court to have before it in the Petition these facts and the applicable law. It is apparent that Petitioners statement of facts differs materially from FNMA's conclusions as to Petitioners affidavits. As an illustration note: the different reasons for the letters of recommendation, when Petitioner (decided or felt for the first time that perhaps FNMA had discriminated against him) (on March 11, 1983 or the latter part of March) and whether it was after (learning the law or discovering additional facts), whether Petitioners conduct was (gentlemanly or deleterious), whether authority to terminate Petitioners employment was in (Austin, Burfiend or the FNMA Board of Directors),

whether a FNMA Asst. Regional V. Pres. (is an officer or not), whether Petitioner seeking other employment in May 1983 was (to mitigate his damages or to recognize Austins authority to terminate his employment), (whether Petitioner agreed to his treatment by FNMA or not) and many, many more including the application of the appropriate law such as estoppel, release etc. It is apparent from the order of August 3, 1987 that the Court gave heavy consideration to FNMA's contentions although they were contrary to the evidence and Petitioners affidavits as well as the Attachments thereto as well as the allegations. See: Sexton, supra at p. 479:

> "We shall here state the basic facts and inferences drawn from them in a way most favorable to Sexton, as we must in considering this motion for summary judgment. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

and Hishon v. King & Spalding 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

"2. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Dispute exists as to material facts which should not have been decided by the Court on summary judgment. Petitioner is not required to prove his entire case by affidavit on motion for summary judgment. Petitioner is entitled to a jury trial on these issues.

The order of August 3, 1987 at p. A-25 states: "Discussions with Burfeind established that Kasper would receive credit for 19 years of service and 6 months severance pay. An agreement was reached..." (Emphasis supplied). That "an agreement was reached" - is contrary to the evidence. Burfeind's Memo to the Files providing "Continuing Employment Arrangements..." does not purport to be an agreement between FNMA and Petitioner. It was, at most, an offer. FNMA refers

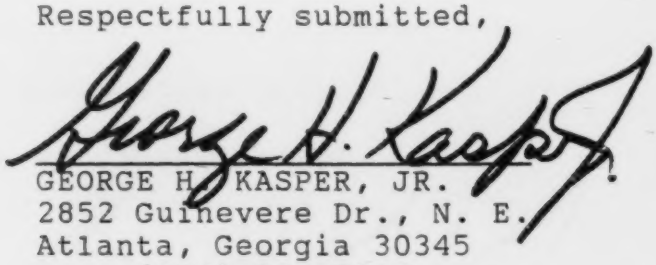
to it as an "offer". However, the Memo, even if it amounts of an offer, probably is not valid or enforceable. It would probably be construed as an illegal offer to perpetrate a fraud on the Civil Service Commission if no actual employment existed as represented, or was not intended to exist at FNMA's option, especially if it was to delay timely EEOC charges. FNMA certified to the Civil Service Commission and to the State of Georgia that Petitioners employment with FNMA continued as ARVP-Counsel until August 5, 1983 when he was then involuntarily retired. Yet, in order to bar Petitioners EEOC claim, FNMA tells the Court that employment was terminated on July 22, 1982, Something is wrong. FNMA had a suggested "Release Form" for use in termination of employment. Why was this release not offered if termination was intended in July 1982, as it was discussed on July 26, 1983? A voidable illegal offer

is not an agreement.

CONCLUSION

For the reasons shown in the Petition for Writ of Certiorari,the Brief of Respondent in Opposition, and this Reply Brief of Petitioner, the Petition for Writ of Certiorari should be granted and the judgment of the Eleventh Circuit Court of Appeals should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Reply Brief of Petitioner to Brief of Respondent in Opposition to Petition for Writ of Certiorari upon

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Attorneys for Respondent, Federal National Mortgage Association, by first class mail, duly addressed and postage prepaid.

This 22nd day of January, 1988.

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